

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBYN F. ODOM and U.S. POSTAL SERVICE,
POST OFFICE, Trenton, NJ

*Docket No. 99-8; Submitted on the Record;
Issued October 6, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
VALERIE D. EVANS-HARRELL

The issue is whether appellant met her burden of proof to establish that she sustained permanent impairment of her right arm, which entitles her to a schedule award.

The Board finds that the case is not in posture for decision regarding whether appellant sustained permanent impairment of her right arm, which entitles her to a schedule award.

This is the second appeal in the present case. In the prior appeal, the Board issued a decision¹ on March 3, 1997 in which it set aside the February 11 and October 28, 1994 decisions of the Office of Workers' Compensation Programs on the grounds that further development of the medical evidence was necessary in order to determine whether appellant sustained permanent impairment of her right arm, which entitles her to a schedule award.² The Board remanded the case to the Office for a determination of such permanent impairment to include an evaluation regarding the right arm pain reported by the physicians of record. The Board directed the Office to determine whether appellant's right wrist ganglion was employment related and instructed it, after such development deemed necessary, to issue an appropriate decision. The facts and circumstances of the case up to that point are set forth in the Board's prior decision and are incorporated herein by reference.

An employee seeking compensation under the Federal Employees' Compensation Act³ has the burden of establishing the essential elements of his claim by the weight of the reliable,

¹ Docket No. 95-1190.

² On June 30, 1989 appellant, then a 28-year-old letter sorting machine clerk, sustained an employment-related torn ligament of her right wrist. Appellant received compensation for periods of disability and later claimed that she was entitled to a schedule award for permanent impairment of her right arm.

³ 5 U.S.C. §§ 8101-8193.

probative and substantial evidence,⁴ including that he sustained an injury in the performance of duty as alleged and that his disability, if any, was causally related to the employment injury.⁵ Section 8107 of the Act provides that if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.⁶ Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants the Office has adopted the American Medical Association, (A.M.A.) *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) as a standard for evaluating schedule losses and the Board has concurred in such adoption.⁷

After the Board's March 3, 1997 decision, the Office referred appellant and the case record to Dr. Stanley Askin, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion regarding whether she had permanent impairment of her right arm, which entitles her to a schedule award. By decision dated August 7, 1997, the Office denied appellant's schedule award claim on the grounds that the opinion of Dr. Askin showed that she did not have permanent impairment of her right arm. In August 1997, the Office accepted that appellant's right wrist ganglion was due to her June 30, 1989 employment injury. By decision dated and finalized June 12, 1998, an Office hearing representative affirmed the Office's August 7, 1997 decision.

Section 8123(a) of the Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.⁸ In situations where a case is properly referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁹

The Board notes that the Office properly referred appellant to Dr. Askin in that there was a conflict in the medical evidence regarding the extent of the permanent impairment, if any, of appellant's right arm.¹⁰ In a report dated November 9, 1993, Dr. Eric D. Strauss, an attending

⁴ *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

⁵ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁶ 5 U.S.C. § 8107(a).

⁷ *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

⁸ 5 U.S.C. § 8123(a); *William C. Bush*, 40 ECAB 1064, 1075 (1989).

⁹ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

¹⁰ The Office previously referred appellant to Dr. Joseph T. Corona, a Board-certified orthopedic surgeon. Appellant failed to appear for a scheduled examination with Dr. Corona and Dr. Corona refused to arrange another appointment with appellant. The Office then properly referred appellant to Dr. Askin.

Board-certified orthopedic surgeon, determined that appellant had a 25 percent impairment due to pain and loss of use associated with a right wrist ganglion, which was caused by ligamentous laxity. In a report dated August 14, 1993, Dr. Ralph F. Franciosi, an attending Board-certified orthopedic surgeon, determined that appellant had a 27.5 percent permanent impairment of her right arm due to ligamentous laxity of her right wrist and pain associated with a right wrist ganglion. In contrast, Dr. Stephen R. Gecha, a Board-certified orthopedic surgeon to whom the Office referred appellant, determined in a report dated December 20, 1993 that appellant had a 20 percent permanent impairment of her right arm due to pain in her right wrist. He stated that, appellant's right wrist ganglion was employment related. In a report dated January 17, 1994, Dr. Gecha indicated that appellant's right wrist pain was due to the ganglion or residual soft tissue irritation.¹¹

In his report dated July 24, 1997, Dr. Askin reported the findings of his examination on July 22, 1997 and determined that appellant did not have any permanent impairment of her right arm under the standards of the A.M.A. *Guides* (4th ed. 1993).¹² He noted that appellant had full range of motion of her upper extremities and indicated that she had some midcarpal laxity of both wrists to a similar degree but did not have any radial or ulnar laxity. Dr. Askin noted that appellant did not have right arm impairment due to a peripheral nerve condition and indicated that she did not have any deficit related to loss of motion or motor strength. He stated that it was possible appellant's right wrist ganglion was employment related and ranked her wrist pain as being one on a scale of one to five. Dr. Askin further noted:

"It is certainly possible that a ganglion can be productive of discomfort with exertion. Please also note that a ganglion can be easily addressed. Firstly, ganglions can abate spontaneously and to the extent that they do not, a simple measure to manage a ganglion is to aspirate it, more or less 'popping the bubble.' On a theoretical basis, a ganglion can also be excised, but I ordinarily do not recommend excision because it seems to me that the surgical trauma of excision is worse than living with the condition (the cure is worse than the condition). Insofar as I am aware, any permanent impairment that would be attributed to a ganglion would be negligible as a benign process easily managed and not expected to be permanent in the usual sense of the term."

The Board finds that Dr. Askin did not adequately explain why appellant's right wrist ganglion was not permanent in nature such that it was not appropriate to apply the standards of

¹¹ In reports dated April 30, 1993, January 31 and October 17, 1994, the Office medical advisers indicated that appellant did not have any permanent right arm impairment.

¹² It was appropriate to apply the standards of the fourth edition of the A.M.A. *Guides*, rather than the third revised edition, in that Dr. Askin's evaluation constituted new evidence and a *de novo* decision was to be issued by the Office hearing representative regarding appellant's permanent impairment; see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Reviews of the Written Record*, Chapter 2.1601.8 (June 1997). The Office also properly advised Dr. Askin of FECA Bulletin 96-17 (issued September 20, 1996) concerning the consideration of pain in evaluating impairment in that this bulletin relates to the application of the fourth edition of the A.M.A., *Guides*.

the A.M.A. *Guides* relating to nonperipheral pain of the wrist and hand.¹³ Dr. Askin generally indicated that ganglions tended to be temporary conditions, but he did not sufficiently detail the facts of appellant's particular condition or explain why he felt that her ganglion was temporary in nature.¹⁴ Such an explanation is particularly necessary in the present case in that several physicians have reported that, since at least mid 1983, appellant has had a right wrist ganglion in the same location, which has been productive of notable pain. Therefore, Dr. Askin has not fully explained how his assessment of permanent impairment was derived in accordance with the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses.¹⁵

In a situation where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original opinion.¹⁶ For the reasons discussed above, the opinion of Dr. Askin is in need of clarification and elaboration.

Therefore, in order to resolve the continuing conflict in the medical opinion, the case will be remanded to the Office for referral of the case record, a statement of accepted facts and, if necessary, appellant, to Dr. Askin for a supplemental report regarding whether appellant has permanent impairment of her right arm particularly with respect to pain associated with her right wrist ganglion. If Dr. Askin is unwilling or unable to clarify and elaborate on his opinion, the case should be referred to another appropriate impartial medical specialist.¹⁷ After such further development as the Office deems necessary, an appropriate decision should be issued regarding whether appellant has permanent impairment of her right arm, which entitles her to a schedule award.

¹³ See A.M.A., *Guides* at 15-22, 35-38.

¹⁴ Dr. Askin indicated that appellant experienced pain from her ganglion and generally indicated that ganglions could be treated through excision. He then stated that, it would not be worthwhile to treat appellant's ganglion through excision without fully explaining his reasoning for such an opinion.

¹⁵ See *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989) (finding that an opinion, which is not based upon the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment).

¹⁶ *Nancy Lackner (Jack D. Lackner)*, 40 ECAB 232, 238 (1988); *Harold Travis*, 30 ECAB 1071, 1078 (1979).

¹⁷ See *Harold Travis*, 30 ECAB 1071, 1078-79 (1979).

The decision of the Office of Workers' Compensation Programs dated and finalized June 12, 1998 is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, DC
October 6, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Valerie D. Evans-Harrell
Alternate Member